United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

497

74-2156

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FRED LOWENSCHUSS, Trustee for FRED LOWENSCHUSS Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

Plaintiff-Appellant,

—against—

W. J. KANE, H. J. BERRY, R. M. BROWN, JR., W. CORBUS, D. K. DAVID, H. C. GILLESPIE, J. S. KROH, E. A. LE PAGE, R. F. LONGACRE, M. D. POTTS, J. M. SCHIFF, P. A. SMITH, H. TAYLOR, JR., E. J. TONER, W. I. WALSH, N. F. WHITTAKER, J. A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.) and GREAT ATLANTIC & PACIFIC TEA CO., INC. and C. G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & CO.,

Defendants-Appellees.

RACHEL C. CARPENTER,

Appellant.

BRIEF FOR DEFENDANTS-APPELLEES GULF & WESTERN INDUSTRIES, INC. AND CHARLES G. BLUHDORN

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United States Court of Appeals
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FRED LOWENSCHUSS, Trustee for Fred Lowenschuss Associates Pension Plan, individually and on behalf of all other persons and shareholders of Great Atlantic & Pacific Tea Co., Inc. who are similarly situated,

Plaintiff-Appellant,

—against—

W. J. KANE, H. J. BERRY, R. M. BROWN, JR., W. CORBUS, D. K. DAVID, H. C. GILLESPIE, J. S. KROH, E. A. LE PAGE, R. F. LONGACRE, M. D. POTTS, J. M. SCHIFF, P. A. SMITH, H. TAYLOR, JR., E. J. TONER, W. I. WALSH, N. F. WHITTAKER, J. A. ZEIGLER (all of whom are officers and directors of Great Atlantic & Pacific Tea Co., Inc.) and GREAT ATLANTIC & PACIFIC TEA CO., INC. and C. G. BLUHDORN and GULF & WESTERN INDUSTRIES, INC., and KIDDER, PEABODY & Co.,

Defendants-Appellees,

RACHEL C. CARPENTER,

Appellant.

BRIEF FOR DEFENDANTS-APPELLEES GULF & WESTERN INDUSTRIES, INC. AND CHARLES G. BLUHDORN

STATEMENT*

This appeal by plaintiff-appellant Fred Lowenschuss as trustee for his in-house "pension fund" ("Lowenschuss") is from an order dismissing his claim for the benefits of

* Citations to the joint appendix have the suffix "a". Citations to Lowenschuss' "Brief on Behalf of Plaintiff-Appellant" are in the form "L. Br. ." Citations to the "Brief for Appellant Carpenter" are in the form "C. Br. ."

a tender offer made by defendant-appellee Gulf & Western Industries, Inc. ("G&W"). Also participating on this appeal is appellant Rachel C. Carpenter ("Carpenter"), who first filed a notice of appearance after receipt of the class notice required by the district court's order, but who filed no briefs or other papers or made any argument below.

The facts here concern the tender offer made by G&W for shares of the common stock of the Great Atlantic & Pacific Tea Co., Inc. (commonly known as "A&P") on February 2, 1973. On the very day that the offer was made, A&P's management announced that it would sue to block it on antitrust grounds. It did so on the next business day, February 5, and secured a preliminary injunction against the offer on February 13, 1973. Following an accelerated appeal, this Court affirmed the injunction on March 13, 1973. *Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687 (2d Cir. 1973).

Appellants, claiming to represent a class defined as those A&P shareholders "who tendered" to obtain the premium price offered by G&W (25% above market), argue that they have a right to the benefits of the tender offer, even though it was enjoined by this Court before consummation. They argue that they should be awarded damages because of G&W's compliance with that injunction. They claim that their tenders of A&P shares, even after public knowledge of A&P's antitrust and securities law action, created a binding agreement which was not affected by this Court's injunction, even though it was precisely the consummation of that agreement which this Court forbade. The court below rejected that argument, just as this Court implicitly did in the tender offer litigation.

The district court here was plainly correct in stating that the only coherent claim that could be drawn from the complaint and other papers filed was one which sounded in "contract," but that such a claim was preempted by the

federal injunction. Appellants' papers are interspersed with references to various sections of the federal securities laws. Such references did not create a Securities Act claim.

To the contrary, all that is presented here is a series of overreaching claims essentially based on the frustration of appellants' expectations of a windfall profit. Appellee G&W purchased no shares, sold no shares, and there is no assertion of unjust enrichment or claim for the "disgorgement" of wrongful profits. Appellants did not suffer the imposition of a defective tender offer; they complain that they were not allowed to do so. There is only their claim for enrichment, based in one way or another on the advantageous business opportunity presented in the tender offer which this Court enjoined. In issuing the injunction, this Court expressly considered the interests of these tendering shareholders of A&P and held that they must yield to overriding federal policies. 476 F.2d at 698.

It is important to distinguish at the outset that this action expressly concerns the A&P shareholders "who tendered" (10a)—not the different class of individuals who were not A&P shareholders when the offer was made but first "purchased" A&P shares following announcement of the tender offer. That claim, brought on behalf of a different class of a recognizably different theory is pending below in a separate action entitled *Lowenschuss* v. *Gulf & Western Industries, Inc.*, 73 Civ. 2931 (S.D.N.Y.) (hereinafter *"Lowenschuss II"*). Hardly disguisable efforts have been made by appellant Lowenschuss here to confuse the operative theories of the second action with those in the instant case in hopes of salvaging it through confusion. (*See* L. Br. 53, 99, 100-01.) Carpenter, of course, cannot employ the same tactic since she was an A&P shareholder before the offer and remains such after the offer, thus standing within the limits of the "class" in this action as alleged and defined.*

* It is also important that the Court not be drawn by Lowenschuss to reflect inadvertantly on the merits of *Lowenschuss II*, pending in the court below, because that case presents very special problems not

To effect an orderly presentation, we shall demonstrate the non-existence of any federal claim and proceed to a consideration of the so-called "contractual" claim thereafter.

Restatement of the Issues Presented

1. Whether appellants' claim for the benefits of a tender offer, enjoined to satisfy federal regulatory policy, states a claim upon which federal relief can be granted.

2. Whether appellants can claim "contractual" damages on the basis of G&W's compliance with this Court's order, which barred consummation of the tender offer for reasons of overriding federal policy.

3. Whether G&W's retirement from the enjoined and defunct tender offer created a claim upon which federal relief may be granted.

4. Whether the Court below properly dismissed the complaint on the law or rather manifested "bias towards Mr. Lowenschuss individually." (L. Br. 107).

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previously adjudicated. *Lowenschuss II* is brought on behalf of those "who purchased" A&P stock to tender it in the offer or otherwise speculate, thereby hoping to reap a quick profit—7% in less than 15 days in his case, says Lowenschuss (112a). Such activity is called "risk-arbitrage," a trading game far different from and more dangerous than that of the typical "speculators and chartists of Wall and Bay Streets" referred to in *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (L. Br. 52-53). These risk-arbitrageurs attempt to profit on the very "spread" between the tender offer price and the market price which is caused by the risk that some, and perhaps all of the shares tendered will not be accepted. In a contested tender offer, the chief risk represented by the price "spread" is the possibility of legal action by the target corporation, especially on antitrust grounds. *See* Henry, *Activities of Arbitrageurs in Tender Offers*, 119 U. Pa. L. Rev. 466, 468 (1971). Whether there is a federal right for those who, in effect, "make odds" on potential illegality is a substantial question.

Counterstatement of Facts

A. G&W's Tender Offer and A&P's Counterattack

On the afternoon of Thursday, February 1, 1973, G&W publicly announced an intention to make a cash tender offer for 3,750,000 shares of A&P common stock at $20 per share (17a to 17a-6; 21a). These shares, together with 1,045,800 shares previously acquired by G&W in the open market (17a-2), would constitute approximately 19% of A&P's outstanding common stock (21a). The offering price was about $4 per share—or twenty-five percent—above the last prior closing market prices for A&P stock (17a-1).

G&W filed statements pursuant to Rule 14d-1 of the General Rules and Regulations under the Securities Exchange Act of 1934 ("the Act") (17a-4). The offer initially became effective on Friday, February 2. Advertisements setting forth its details were printed in the usual newspapers and financial journals, and G&W caused the offering material to be distributed (73a; 74a; 112a; 113a).

In substance, G&W offered to purchase from A&P shareholders a maximum of 3,750,000 A&P shares. The number of shares to be purchased from each tendering shareholder would depend upon the total number tendered. Selection of shares would be made on a pro rata basis from all those who had tendered on or before the close of business on February 13, 1974 (17a). While no tender was thus required until the expiration date, those who might, for some reason, tender early could withdraw their shares prior to the close of business on Friday, February 9 (17a-1). G&W reserved the right to purchase additional shares on a pro rata basis and to extend the offer at any time by notice of extension (17a; 17a-3). Payment would be made as soon as practicable after the closing or any subsequent extension date (17a).

Among other things, the offering material summarized G&W's operations, including the fact that it was a diversi-

fied company, partly engaged in the production of food products (17a-2), and stated that it was purchasing A&P shares as an investment and had not made a determination as to additional purchases of A&P shares (17a-2). It announced that G&W's Chairman held a large number of shares of The Bohack Corporation, a New York-based supermarket chain, which were being placed in a voting trust; and that certain G&W directors (including G&W's Chairman) who had also been Bohack directors, had tendered their resignations to Bohack (17a-3).

A&P's management immediately took steps to quash the tender offer (22a; 107a; 115a). On the morning of February 2, 1973, the very day the offer was made, it issued a release, carried on the broad tape,* in which A&P's chairman William J. Kane asserted that the offer was "not in the best interest of our shareholders," and that the offering price was "inadequate" (22a). The release announced that A&P would sue to block the offer on, *inter alia,* antitrust grounds:

> "[I]t would seem that the acquisition of a large block of A&P shares by Gulf & Western raises most serious questions under the antitrust laws. We have instructed our attorneys to take whatever action is proper to protect the company and are preparing to communicate with our shareholders promptly." (22a; 107a; 115a-116a) *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.,* 356 F.Supp. 1066, 1070 (S.D.N.Y. 1973).

Over the weekend of February 3-4 1973, A&P's management caused a letter to be sent to every A&P shareholder and placed large advertisements in the newspapers which appeared on the morning of the next business day, Monday, February 5, 1973 (22a). Both the letter and the advertise-

* Appellant Lowenschuss states that he became aware of A&P's "defensive" plans at or about 11:42 A.M. on February 2, 1973 (107a; 115a). As a matter of public record, the release went over the "broad tape" at 11:11 A.M. on that date.

ments condemned the offer, and restated the antitrust charges and A&P's intention to stop the offer through legal action:

> "Our attorneys have advised us that the acquisition by Gulf & Western of a large block of A&P stock raises serious questions under the antitrust laws and we have instructed them to take whatever action deemed appropriate to protect A&P's interests." (22a; 116a) (356 F.Supp. at 1076).

Later that same day, February 5, both G&W and A&P moved to bring federal law to bear in support of their respective positions (24a-25a). On one hand, G&W commenced an action in the court below which attacked the accuracy of A&P's releases opposing the tender offer and denigrating the adequacy of its price. On the other hand, A&P, as it had promised, counterclaimed that so large an acquisition by G&W could not be considered an "investment"; that G&W's diverse operations would create potential buyer-supplier and "reciprocal" dealing "foreclosures"; that for these and other reasons, consummation of the tender offer would violate the antitrust laws; and that therefore the offering material violated the securities laws. Both parties sought injunctive relief. *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.*, 73 Civ. 536 (S.D.N.Y.) (hereinafter *"G&W* v. *A&P"*). News of the litigation was given extensive coverage over the broad tape and in newspapers and financial journals.* (22a; 44a; 107a; 115a-116a).

G&W and A&P engaged in expedited discovery, and an evidentiary hearing was held before Judge Kevin T. Duffy on February 9, 1973. To give assurance as to the limited nature of the offer, G&W stated at the hearing that it would not accept shares beyond the maxium previously announced

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* *See* "A&P will fight Gulf & Western's Bid for its Stock," Wall St. J., Feb. 5, 1973, at 5, Col. 1; "A&P and G&W are suing each other," N. Y. Times, Feb. 6, 1973, at 47, Col. 2.

and issued an appropriate press release to that effect. *See Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co.*, 476 F.2d 687, 690 n.2 (2d Cir. 1973). On February 13, 1973, Judge Duffy filed an opinion (reported at 356 F. Supp. 1066 (S.D.N.Y. 1973)), in which he denied G&W's application for relief and granted that of A&P. The Court found that although A&P's charges were "unproven" (356 F. Supp. at 1073), nevertheless the questions raised were "substantial, difficult and doubtful" (356 F. Supp. at 1074) and that the tender offer should promptly be halted at its early stage pending a full trial, rather than proceed to a later stage and a situation that might be difficult to unravel (356 F. Supp. at 1073). The court's order expressly enjoined consummation of the tender offer (356 F. Supp. at 1073; 25a).

G&W's tender offer had thus been alive only a few hours when A&P announced its intention to sue to block it; only two business days when litigation was actually commenced; and only eight business days when the district court's opinion had been rendered.

On the day of and following the issuance of the district court's injunction against the offer, G&W issued three successive press releases in which it was announced, *inter alia*, that no shares could be accepted unless the injunction were lifted, that the tender offer would be "extended", and that shares tendered in excess of the maximum were being immediately returned. Because of the timing of the appeal, the offer was further extended until March 16, 1973 on the same basis.

B. The Appeal to the Second Circuit

Upon G&W's application, this Court on February 20, 1973, expedited consideration of the appeal from the district court's order enjoining consummation of the tender offer (25a). Following the filing of briefs, argument was held on March 8, 1973. On March 12 this Court affirmed,

holding that the record below raised sufficient question that the proposed acquisition might have potential anticompetitive effects in wide-ranging product areas and that there was a sufficient likelihood of success on these and the securities act claims (which were intertwined with the antitrust claims), to justify the preliminary injunction, given the balance of hardships involved. *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co., supra,* 476 F.2d at 698-99.

Significantly, as to A&P's claim that consummation of the offer could potentially result in undesirable "reciprocal practices," this Court held that it did not matter whether G&W could control A&P or what practices would actually be followed; rather, it would be "third-parties' perception" of the resulting "market structure conductive to . . . reciprocity effect" which would govern. (476 F.2d at 694). It remanded the case for trial with the suggestion that further proceedings be expedited. It also suggested that G&W might later be able to "renew" its offer if it were successful on the merits (476 F.2d at 698).

Following this Court's decision, G&W issued a press release announcing general procedures for A&P shareholders to withdraw their shares (199a). Shortly thereafter, on March 16, 1973, the adjourned expiration date of the offer, G&W issued a further press release restating that the offer had been curtailed by injunction and stating that while the status quo would be preserved by "extending" the offer until June 15 subject to termination on three days' notice, no new shares would be accepted and reiterated that all shares tendered were available for withdrawal.

Following remand of the case to the district court, A&P commenced discovery proceedings, serving and filing its 7-page "First Request For Production of Documents," and its 25-page "First Interrogatories to Plaintiff and Third-Party Defendant," on April 17, 1973, which evidenced in

a concrete way the enormous scope of the litigation posed by the antitrust issues which had become the "law of the case." On April 25, 1973, G&W filed its own interrogatories to A&P, forty-eight pages in length. Reflecting the burden that had been imposed by the G&W-A&P entanglement, the parties agreed, and the district court so ordered on May 29, 1973, that discovery be stayed pending a determination as to whether further litigation should properly be pursued (26a). That stay was extended by a subsequent order dated July 19, 1973.

C. Appellant Lowenschuss' Role on Appeal in the Tender Offer Litigation

In addition to commencing the instant action, more fully described *infra*, appellant Lowenschuss participated in the appeal to this Court from the district court order enjoining consummation of the tender offer. On March 21, 1973, he filed a "Petition to Intervene and/or File a Brief Amicus Curiae" (39a-42a) with accompanying affidavit (44a-49a), which this Court granted to the extent of permitting submission of papers as *amicus curiae* (along with similar applications by other A&P shareholders*). There and in his brief (51a-65a), appellant Lowenschuss repeatedly acknowledged that the injunction below, if not undone, would prevent tendering shareholders from receiving the tender offer price (57a; 59a). He urged that the tender offer should go forward because A&P's attack on the offer was specious (45a) and solely "motivated by selfish concerns of the officers and directors of A&P" (47a); and that even after being "enlightened" by A&P as to the supposed legal defects in the offer, he and the tendering shareholders were still "most happy and thrilled" to tender shares to

* The Josephine H. McIntosh Foundation Inc. and Neuberger & Berman both argued that the Court should permit consummation of the tender offer.

G&W at the bonus price of $20 per share (47a-48a).* He primarily urged that the injunction be altered to permit G&W to take and pay for the 3,750,000 A&P shares, suggesting that the shares could be "sterilized" (deprived of all voting power) or the Bohack shares isolated even further (46a; 64a). Appellant Lowenschuss emphasized that he had "no desire to have the status quo restored" (48a).

That proposal was rejected by this Court. It affirmed the injunction below, neither adopting the alteration sponsored by appellant Lowenschuss nor suggesting that the district court give consideration to it on remand. It held that the tendering shareholders' expectation of the bonus price would have to yield to overriding federal concerns, and that an implied condition of compliance with the law was inherent in the terms of every tender offer. (476 F.2d at 698).

D. Commencement of the Instant Action (*"Lowenschuss I"*)

Two days after the district court enjoined consummation of the tender offer, appellant Lowenschuss commenced this action in the United States District Court for the Eastern District of Pennsylvania, which was later transferred to the court below.** Jurisdiction is broadly asserted under unspecified sections of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, the Securities Act of 1934, 15 U.S.C. § 78 *et seq.* (the "1934 Act") and the rules and regulations promul-

* In its own papers on appeal, G&W argued that the tender offer had brought benefits to A&P shareholders who could sell at a premium price, and that the opportunity should not be quashed. *Brief for Appellants* at 24, *G&W* v. *A&P* No. 73-1223 (2d Cir.).

** On March 16, 1973, the A&P defendants moved to transfer this action to the court below pursuant to 28 U.S.C. §1404(a). On or about March 26, 1973, Mr. Bluhdorn moved to dismiss the complaint or quash the purported service on the ground that he had no contacts with Pennsylvania which would support jurisdiction there. On April 2, 1973, Clarence Newcomer, District Judge, ordered that the action be transferred to the court below and that all further proceedings be stayed until further order. On May 4, 1973, the original record and certified copy of docket entries were transferred here, then filed on May 7, 1973.

gated thereunder. Appellant Lowenschuss claims to represent a class comprised of all A&P shareholders "who tendered" their shares in the offer (10a) and seeks "damages" of $75,000,000 (15a), the total amount G&W had offered to pay for 3,750,000 shares. In appellant Lowenschuss' own terms, the purpose of this action is to "enforce consummation of the tender offer" in fact or in effect (23a). On March 16, 1973, appellant Lowenschuss moved to have the action declared a class action under Rule 23 F.R.C.P. (L. Br. 13).

Apparent from the allegations of the complaint, is that its original thrust was against A&P and its management who were broadly accused of wrongfully interfering with the tender offer (14a) and were to be subjected to penal damages (15a). When, however, A&P proved the more successful in the original litigation, appellant Lowenschuss stipulated to discontinue the action against the A&P defendants after they filed a motion for judgment here and instead decided to extract the proposed "recovery" entirely from those who had made the offer available (81a).

As against G&W and Mr. Bluhdorn, it is alleged that the offer contained an implied "warranty" that there were no legal impediments (13a) (contrary to this Court's view that there was, rather, an implied condition that the offer was subject to any legal impediments). It is also alleged that G&W warranted that the proposed acquisition was "for investment purposes" (13a). The apparent conclusion is that G&W is obliged to go through with payment under the offer's terms to anyone who tendered, even if the offer could not go forward (15a).

E. The Second Class Action (*"Lowenschuss II"*)

On May 7, 1973, appellant Lowenschuss filed in the United States District Court for the Eastern District of Pennsylvania a second "class action" against G&W, Mr. Bluhdorn and Kidder, Peabody & Co. ("Kidder"), alleging,

inter alia, violations of Sections 9, 10(b) and 14(d) and (e) of the 1934 Act in connection with the same tender offer (24a). Such action was also ordered transferred to the Court below.* *Lowenschuss* v. *Gulf & Western Industries, Inc.*, 73 Civ. 2931 (S.D.N.Y.). This action, however, proceeds on a different theory on behalf of a different "class", *viz.*: those "who purchased" their A&P shares, *after* G&W's offer was announced in order to tender or otherwise speculate (122a; 149a-150a), and is presently pending below.

F. The Motion for Judgment and the Decision Below

Each of the defendants moved against the complaint in the instant action in June, 1973 (2a; 18a-19a; 85a). Appellant Lowenschuss cross-moved for summary judgment against G&W, Mr. Bluhdorn and Kidder, claiming a right to the tender offer "bargain" and additional damages for having to await judicial resolution to obtain that "bargain" (76a-77a). Appellant Lowenschuss also began to borrow heavily from, and transpose the distinct claims of *Lowenschuss II.* Then, in apparent recognition of the practical effect of this Court's decision in the tender offer litigation, appellant Lowenschuss dismissed all his claims against the A&P defendants (81a-82a).

On July 25, 1973, Judge Duffy rendered an opinion which granted appellant Lowenschuss' then-pending motion for class determination (88a-89a), but held that the action should be dismissed on the merits, directing him to notify the class (so as to permit them to adhere to or opt out of the determination) pursuant to Rule 23 (97a).

The opinion stated that although the complaint purported to invoke the securities acts, the essence of the claim was to seek the benefits of a supposed tender offer "contract" on behalf of those "who tendered" (87a-88a). It stated that consummation of the tender offer was barred because of an

* This action was ordered transferred to the United States District Court for the Southern District of New York on July 2, 1973.

order of the Court (87a); that both his and this Court's opinions prohibiting consummation of the offer had made it "explicitly clear" that the "merits of the alleged violations" of the securities and antitrust laws had not been determined, but the necessity for full inquiry had rendered consummation of the offer impossible (94a); that the Clayton Act allegations, which effectively brought the offer to a standstill, were based substantially on matters where a "juxtaposition" of economic facts, rather than fault, played the key role (93a); that the threatened bar to the offer had become clear well before there was any requirement to tender and during the period when no tender could be binding (95a); and that no recovery was available for failure of the offer to go forward (97a).

Thereafter, appellant Lowenschuss sought reargument, claiming in correspondence to the court and others (a) that the marginal reference in footnote 1 of the Court's opinion (in which Judge Duffy had expressed ethical concern about a lawyer's buying shares to tender, where he could have either the benefits of a successful offer or the benefits of the inevitable lawsuit in an unsuccessful one) should be eliminated, and (b) that although appellant Lowenschuss had sought judgment on the merits, the court was apparently required to repress its inclination as to the merits until the class received initial notice of the suit (133a). Judge Duffy denied the request for reargument, but ordered that the members of the class be given the opportunity (in addition to their options under Rule 23) to seek a redetermination of the decision and be so notified (134a).

Following Judge Duffy's decision that G&W was not required to maintain the defunct tender offer, G&W formally withdrew it. Subsequently, G&W and A&P reached a stipulation discontinuing the tender offer litigation on the condition, *inter alia,* that G&W ultimately dispose of the A&P shares acquired prior to the offer. This was so

ordered on September 26, 1973 and *G&W* v. *A&P* was dismissed (173a).

G. The Procedural Confusion and Spurious Appeals Generated by Plaintiff-Appellant

Instead of complying with the district court's order, appellant Lowenschuss immediately undertook extravagant means to evade it. These matters have already been brought to the attention of this Court on a prior occasion. On January 8, 1974, on motion of G&W and others, this Court remanded a prior and spurious appeal attempted by appellant Lowenschuss. This action came about in the following circumstances.

After his original decision of July 25, 1973 dismissing the complaint, Judge Duffy signed an order dated August 13, 1973 embodying that decision (155a-156a). But at appellant Lowenschuss' own request in connection with his application for reargument, the Court did not enter this order. Before the August 13 order had any legal effect (because it was withheld and not entered), the district court issued its Endorsement and Order dated August 23, 1973, denying appellant Lowenschuss' motion for reargument. This order modified the original decision, deferring any final order on the merits until there was an opportunity for the class members to be heard (133a-134a). Shortly thereafter, however, appellant Lowenschuss obtained a stay of the notice portions of this modified order until September 5, 1973, in order to work out what he claimed would be a better procedure for notification. This, however, turned out to be a confusing suggestion that a joint notice be sent to the members of the two alleged classes in *Lowenschuss I* and *Lowenschuss II*, although the persons in the classes, the claims, and the status of each case were different (147a-150a).

While appellant Lowenschuss' new request was under consideration, the superseded order of August 13 (embody-

ing Judge Duffy's very first decision) was sent to the clerk's office for housekeeping purposes, and mistakenly entered on September 26, 1973—although it had already been supplanted by the September 5 modification. Taking advantage of this confusion, appellant Lowenschuss entered an appeal from the misfiled order, claiming that it was a final order, despite the fact that he knew it was of no effect (172a-175a).

When, on November 12, 1973, the order which Judge Duffy actually intended was entered (161a-163a), appellant Lowenschuss used the device of his own spurious appeal as the ground for a motion to vacate, claiming that his notice of appeal had deprived the district court of jurisdiction (167a-171a). That strategy was curtailed when, on G&W's motion, this Court on January 8, 1974, ordered that the appeal be remanded "for whatever action the Honorable Kevin T. Duffy, District Judge, will take" (182a) (Docket No. 73-2508). Two other related actions taken by the court on that day are described *infra*.

Apparently unhappy with the actions of both this Court and the court below, plaintiff-appellant then moved, following remand to the district court, to "retransfer" the action to the United States District Court for Eastern Pennsylvania and to "vacate" all prior decisions in the action, so that he could relitigate all the issues anew in a different forum (194a-205a; 207a-208a).

On April 16, 1974, Judge Duffy entered an opinion in pursuance of this Court's remand, which endorsed the position G&W had taken as to Lowenschuss' spurious appeal and denied "in all respects" appellant Lowenschuss' motion to vacate the order of November 12 (177a-179a). Then on May 3, 1974, the court entered an order denying appellant Lowenschuss' newest motion to "retransfer" the action and vacate all prior decisions (212a-213a). No appeal has been taken from these orders.

Immediately thereafter, Judge Duffy "updated" his prior order of November 12, 1973 (providing for class notice and opportunity for reargument) and caused it to be entered on May 9, 1974. Pursuant thereto, the "class" was finally notified of appellant Lowenschuss' action in their supposed behalf to obtain as damages the benefits of the defunct tender offer (214a-219a). The order and subjoined notice embodying Judge Duffy's decision as finally entered (214a-219a), advised the class members of the proposed decision and their Rule 23 options to seek exclusion or separate representation, as well as their right to apply for a redetermination (218a-219a). It provided that unless altered following an application for redetermination, the order would at, a specific future date, constitute a final order dismissing the complaint (215a-216a). In response to the notice, no class member sought exclusion or redetermination. One very large shareholder, Rachel Carpenter, filed a notice of appearance below (with no other papers), and is pursuing an appeal herein (222a).

* * * * *

In addition to the spurious prior appeal, appellant Lowenschuss on March 19, 1973 filed a motion to intervene in the *G&W* v. *A&P* tender offer litigation, following its remand to the district court upon affirmance of the injunction. His moving papers requested intervention for the sole purpose of filing a "Motion for Modification" of the affirmed injunction. Specifically, the motion proposed that the injunction be amended to permit G&W to take and pay for the tendered A&P shares and that such shares be "sterilized"—the same relief previously proposed in his brief *amicus curiae* to this Court and rejected.

Judge Duffy dismissed that motion to intervene as moot on September 26, 1973. On the same date he ordered the *G&W* v. *A&P* action dismissed on stipulation of the parties. Appellant Lowenschuss then filed appeals from both the

dismissal of his motion to intervene and from the order dismissing the tender offer litigation.

Thereafter, G&W along with A&P and others moved to dismiss these appeals. On January 8, 1974 this Court (including the two members of the Court who sat in the original appeal in *G&W* v. *A&P*) summarily affirmed Judge Duffy's order denying intervention and dismissed the appeal from the final order terminating the *G&W* v. *A&P* litigation*. At the same time it remanded the prior spurious appeal taken by appellant Lowenschuss therein, as set forth above.

ARGUMENT

I

The Complaint Does Not State Any Claim For Relief Under The Federal Securities Laws.

Although the complaint is totally unclear as to its theory of recovery, the papers filed here and below put its substance as follows. Appellants claim a right to "damages" giving them the benefit of the $20 tender offer price of which they were "deprived"—even though that offer has been enjoined. Or, what is much the same thing, appellants seem also to claim that they were deprived of the chance to sell shares in the marketplace at prices which were enhanced by the proposed tender offer price.** Because

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* The appeals bore the docket number 73-2688.

** There is also the general allegation that the tender offer caused a "fluctuation" in the market price of A&P stock (13a), although it is not causally connected to an element of damage or claim for relief. Obviously, that this (or any other) tender enhances the market price of the target stock in anticipation of the offer is an empirical fact, but hardly a "wrong". To the extent appellants claim that they missed out on selling shares on the basis of these enhanced prices, they merely repeat the claim set forth in text above. To the extent appellant Lowenschuss now tries to apply this language to his status as a risk-arbitrageur who bought at those prices in order "to earn 7%"

the tender offer was stopped before any shares could be purchased or monies paid, there is, of course, no possible claim of unjust enrichment or for "disgorging" improper profits. (All shares have long been available for return.) The reverse is true: there is solely appellants' claimed right to extract a windfall profit from a tender offer that failed.

There is no federal interest in, and no basis for, such recovery under the Williams Act amendments* or any other provision of the 1934 Act.

At the outset, appellants' theories face inherent contradictions and insuperable barriers of proving causation. First, their real problem has nothing to do with the alleged Williams Act violations at all. The source of their trouble is that the offer was barred because of potential anticompetitive consequences perceived under Section 7 of the Clayton Act.** If the only problem had been one of defective disclosure under Section 14 of the 1934 Act, "needed correction could speedily be made," and upon republication the offer could have gone forward. This is not so where there are antitrust problems. *Missouri Portland Cement Co.* v. *Cargill, Inc.*, 498 F.2d 851, 870 (2d Cir. 1974).

> "Were the probability of a 1934 Act violation the only problem here, preliminary injunctive relief could probably be fashioned, short of an absolute bar to the tender offer, which would permit these stockholders to reevaluate their tender with the benefit of all material facts. . . . Such relief is not appropriate here, however, in view of the antitrust aspects of the

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in 15 days or less (112a), he is, of course, not pressing the claim of those "who tendered," (*Lowenschuss I*), but the different claim of those "who purchased" in alleged response to the offer (*Lowenschuss II*), raising considerations not involved here. Thus, appellant Carpenter is a true member of the "class" here, but made no purchase of shares during the offering period.

* §§ 13(d)-(e), 14(d)-(f), 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1971).

** 15 U.S.C. § 18 (1971).

case." *Elco Corp.* v. *Microdot Inc.*, 360 F. Supp. 741, 755 n.15 (D. Del. 1973).

It is appellants' claim that they were denied the tender offer price (or contemporary market price). But it is plain that if G&W had presciently been able to set forth this Court's ultimate antitrust views, along with every fact made relevant by those views, in minute detail in the offering materials,* the result would *not* have been to let appellants reap any of the benefits they now claim. To the contrary, the result would have been the same. Neither revelation nor particularization of alleged antitrust theories as part of the offer could prevent or cure an injunction based on them. All of appellant Carpenter's extravagant language about the offer being stopped because of G&W's "concealment" of alleged facts and "wrongful" conduct (C. Br. 9-11) misses the mark because it mistakes the operative cause.

Second, it is clear that at the earliest possible stages, well before the act of "tendering" which is alleged as the basis for recovery here, and indeed before any tender could be binding given the federal 7-day waiting period,** appellants had actual knowledge and there was general public knowledge that legal steps to block the tender offer, *expressly on antitrust grounds,* had been set in motion (44a; 107a; 115a-117a)—indeed that the matter was *sub judice.* (44a; 9[illegible]a) It is totally incredible that appellants

* The special difficulty of making so-called "antitrust" disclosures in offering material—which depend so much on complex judgments on economic facts and which in effect require the offeror to theorize his opponent's case for him—is such that even *after* this Court's decision in *G&W* v. *A&P*, the Securities and Exchange Commission has initiated an investigatory proceeding to ascertain, *inter alia*, whether it should require disclosure of "anti-trust considerations" in filings pursuant to § 13(d)(1) and § 14(d)1 of the 1934 Act relating to tender offers. *See* 39 Fed. Reg. 33835, 33837 (Sept. 20, 1974).

** Section 14(d)(5) of the 1934 Act, 15 U.S.C. § 78n(d)(5) (1971).

could have been led to tender with honest ignorance of a potential antitrust bar to consummation of the offer. Instead, they simply decided to tender in hope of gaining the premium price if the offer succeeded.

Even ignoring these fatal defects, it is clear that the demands pressed by appellants are greatly in excess of those contemplated by the remedial scheme embodied in the Williams Act amendments to the 1934 Act. The essence of the legislation was to create a carefully balanced system of disclosure and regulation. Hearings showed that tender offers often stimulated or displaced inefficient management to benefit the shareholders and the economy,* and Congressional committees declared that federal policy should not add undue burdens:

> "The committee has taken *extreme care* to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid" (emphasis added).**

The focus of Congressional concern was to ensure that the target shareholders were sufficiently informed so that on the one hand, they would not part with their shares for insufficient consideration, or, on the other, would not be persuaded to reject the offer by their own management's claims of inadequate price (usually based on claims of bright prospects or better possible offers). The legislative committees were expressly told that litigation alleging fraud "by one side or the other" was "almost standard operating procedure" in contested tender offers.*** With this and similar problems in mind, Congress enacted a mandatory waiting period so that the clash could unfold without the necessity of any shareholder action. The Williams Act amendments provide that no shareholder need tender

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* S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

** *Id.* A virtually identical statement of federal policy appears in H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

*** H.R. Rep. No. 1711, 90th Cong., 2d Sess. 4 (1968).

until the 10th day of an offer (since all shares tendered during that period must be dealt with pro rata)* and even if a shareholder should tender prematurely, no tender is binding during the first 7 days of an offer.** The effect of this, in the instant case, was to allow appellants to be forewarned of precisely the risk that later materialized.

In all the legislative history there is not a word which suggests that Congress had any intention to guarantee shareholders the windfall benefits of an offer if it had to be enjoined to further federal policy objectives. To the contrary, as to the offeror, the Congressional emphasis in preserving the delicate balance in an offer militates heavily against the imposition of any such disproportionate liability. As to the expectant shareholder, there is no federal interest in insuring him bonus prices which would have been available if the offer succeeded.

The claimed injury of appellants here is entirely different from that protected by the Williams Act and totally outside its target area. Indeed appellant Lowenschuss repeatedly claimed that the alleged imperfections in the offer were *wholly inconsequential to him.* On the appeal of *G&W* v. *A&P,* he told this Court:

> "[T]he shareholders still wish to receive the monies for their tendered shares, after being enlightened by the law firm allegedly representing the interests of A&P" (47a-48a)

and that they were "most happy and thrilled" to tender (47a) and that

> "[P]ertaining to any possible securities law violations or Williams Act violations, I was satisfied to receive $20 per share . . ." (117a).

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* Section 14(d)(6) of the 1934 Act, 15 U.S.C. § 78n(d)(6) (1971).

** Section 14(d)(5) of the 1934 Act, 15 U.S.C. § 78n(d)(5) (1971).

Both appellants, instead of charging that they suffered the imposition of an imperfect offer, complain instead that they were *not allowed* to suffer it.*

Thus Carpenter's claim that the judgment below leaves A&P shareholders "without remedy" (C. Br. 19) is entirely incorrect. Even assuming a violation of Section 14(e) through defective disclosure, the remedy was the early curtailment of the offending offer. Appellant Carpenter simply objects to the cure because there was no profit in it.

This Court has dismissed on several grounds substantially the same type of claims in the context of allegations of far more direct and vicious deceit than those appellants are able to confect here. In *Levine* v. *Seilon, Inc.*, 439 F.2d 328 (2d Cir. 1971), a preferred stockholder alleged that he (and his class) were the intended victims of a misrepresentation by management that it would make a tender offer for his preferred shares. He alleged that although management announced and went through all the motions of preparing the offer, in fact there was never an intention of one, and the real aim was to engineer a redemption of the preferred stock at a much lower call price—which it did. On the basis of these misrepresentations, plaintiff claimed, just as appellants do here, that he was damaged by being deprived

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* Appellant Lowenschuss' reliance on the margin violation cases to establish his claim that a "decline" in market value has been held to be an element of damages "in similar circumstances" (L. Br. 94) is wholly misleading. There, the plaintiff bought and sold securities at a great loss—which could easily have been avoided if the defendant broker had, pursuant to Regulation T, sold plaintiff's margined securities on the required payment date and otherwise curtailed his credit. *See Pearlstein* v. *Scudder & German*, 429 F.2d 1136, 1140 (2d Cir. 1970), *cert. denied*, 401 U. S. 1013 (1971); *Landry* v. *Hemphill, Noyes & Co.*, 473 F.2d 365 (1st Cir.), *cert. denied*, 414 U. S. 1002 (1973). This bears no resemblance to the situation here. Rather, what would have been comparable is if the broker had refused to or was enjoined from extending the improper credit, and the plaintiff had sued, as here, claiming some "loss" because of the credit-frustrated transaction. Moreover, the cases turned expressly on policy considerations specific to federal credit regulation.

of (1) the opportunity to sell his shares while market prices reflected the proposed offer, and alternatively (2) the offering price itself. He sought recovery under both Section 14 of the 1934 Act and Rule 10b-5:

> "The theory there stated [in the amended complaint] was that plaintiff was entitled to what he could have realized if he had sold his preferred stock at the inflated prices prevailing during the summer of 1968, or, more clearly, to what he could have obtained if Seilon had gone through with the exchange offer and he had sold the common while it still commanded a high price."

The Court held:

> "Levine is not entitled to damages on either of such theories." 439 F.2d at 333.

Judge Friendly, speaking for the Court, assumed *arguendo* that in all other respects plaintiff had stated a claim and attacked directly the web of errors and contradictions which underlay the action. First, as to the claim that plaintiff was prevented from selling while market prices were enhanced, the court pointed out that (a) plaintiff obviously had no real intention of so selling, but rather wanted the tender offer itself; (b) in any event, he could not claim the loss of a sale to another, since that would merely let him share in the very deceit he alleged and (c) the claim for the enhanced market prices was a bootstrapping contradiction, since if all the alleged fraud had been revealed, those prices would not have existed:

> "The complaint does not allege that Levine had any intention of selling his preferred shares during the summer or fall of 1968. Although he might have done so if he had learned of Seilon's allegedly deceitful intent, he could hardly be heard to claim compensation for the premium he might have extracted from some innocent victim if he had known of the fraud and the buyer did not. Even if he would have sold during the summer had it not been for Seilon's alleg-

> edly false representation as to the exchange offer, Levine cannot persuasively claim that his loss in not doing so was caused by Seilon's representation since, according to the complaint, if the representation had not been made, the price of his stock would not have been inflated, and there would have been no gain to be realized by a sale. In fact, the complaint says quite clearly that Levine's intention was to hold the shares and tender them to the company, and he wants the benefit he might thus have realized." 439 F.2d at 333-34.

And, as to the claim that he should receive the benefits he might have achieved had the offer not been fraudulently withheld, the Court held squarely that his supposed injury was regarded under federal law as merely the quashing of expectations*—that the federal rule of damages under the 1934 Act did "not entitle him to recover on any such basis." 439 F.2d at 334. Rather,

> "The plain fact is that save for the possibility of selling to an innocent victim, Levine lost nothing from Seilon's alleged fraud except the euphoria he doubtless experienced during the summer and fall of 1968." 439 F.2d at 335.

Indeed, appellants cannot even salvage this action by claiming that it would enhance enforcement of the Williams

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* All of appellant Lowenschuss' theories based on supposed stock price "declines" are nothing more here than a bootstrapping attempt to extract some of the premium made available in the tender offer, which was responsible for the price "rise." Thus, just before the offer, A&P stock had traded as low as 14⅜ (17a-1; 54a; 73a). Even this price range reflected some of G&W's buying support, revealed in the offer materials (17a-2), which would be absent if the offer were stopped or otherwise failed, as appellant recognizes in his estimate that absent G&W's buying, the pre-offer price of A&P shares might have been in the $10 range (55a). The A&P stock traded in the $18 range only after the offer was announced and before the district court's injunction, which was the market-place's reflection of the $20 tender offer price discounted by various risks of nonconsummation. On March 14, the day following this Court's affirmance of that injunction, A&P shares closed at $15, the pre-offer range, remaining at that level through the close of the trading week (March 16, 1973).

Act through the detection of violations. In a case such as this, appellants can fashion a colorable claim for relief *only after* someone else has *already* sued and stopped consummation of the tender offer, thus enforcing the securities and antitrust laws by eliminating the offending transaction. In other words, it lacks even the elemental qualities necessary to maintain a private right of action. *See J. I. Case Co.* v. *Borak,* 377 U.S. 426, 432-33 (1964); *H. K. Porter Co.* v. *Nicholson File Co.,* 482 F.2d 421, 423-24 (1st Cir. 1973).

Appellants take exception to the district court's reference to Lowenschuss' switching contract and securities claims "without compunction" (89a), but that characterization is entirely accurate. Appellants here shift grounds, claims and theories without the slightest analytical regard for continuity or consistency. Thus, appellant Carpenter is likewise unable to spell out *any* federal claim here, but merely namedrops the federal securities statutes, and states that if the Court finds that there was a "binding" contract, then whether damages are awarded for breach of contract or under federal law "is altogether immaterial" (C. Br. 17). The real difficulty lies in the unmaintainable nature of the claims themselves.

The Court below was fully justified in holding that no reasonable construction of the complaint could create a claim recognizable under federal securities law.

II

Appellants Cannot Claim "Contractual" Damages on the Basis of G&W's Compliance with a Federal Order Barring Performance and Based Upon Overriding Federal Policy Considerations.

The fundamental fact of this case is that the bar to consummation of the tender offer, of which appellants complain, lay in a federal injunction designed to effect the purposes of two federal regulatory statutes. It forbade per-

formance and appellants cannot claim damages because G&W complied with it. While we agree with the court below that the result here is the same whether the matter is considered under state or federal law (99a n.5), it seems clear that the effect of such an injunction here is a federal question.

A tender offer presents a *sui generis* situation. It is a public offer national in scope interlaced by federal regulation which can hardly be assimilated to a privately negotiated commercial bargain. Critical terms are directly regulated. For example, as previously noted, no matter what was said or done, no shareholder here could have made a binding commitment to tender in the first seven days of the offer because of Section 14 (d)(5) of the 1934 Act. During that time the offer had already been taken *sub judice* and its consummation rendered problematical. Other federal requirements increase the risk of nonconsummation. The mandated delay alone exposes the offer to strategic antitrust attack, which has drawn on the increasingly expansive criteria of Section 7 of the Clayton Act. As more federal concerns are thus articulated and interposed, the area becomes one of federal responsibility. *See Illinois* v. *City of Milwaukee*, 406 U.S. 91, 99-100 (1972); *Ivy Broadcasting Co.* v. *American Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968). And when it is necessary directly to intervene in order to vindicate federal policy in such circumstances, federal law determines the extent and nature of the consequences. *See Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38, 40 (1941); *see also Lear, Inc.* v. *Adkins*, 395 U.S. 653, 673-74 (1969).

In the case of tender offers, the federal interest is plain. In passing the Williams Act, Congress made special note of the importance of maintaining perspective and equilibrium, making clear that it had taken "extreme care" to avoid a shift in the "balance of regulation" toward or

against tender offers.* This Court, in a related context, has twice recalled that tender offers often provide important benefits and made clear that no new inhibitions and burdens should be raised to discourage them. *Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157, 164 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582 (1973); *see American Standard, Inc.* v. *Crane Co.*, Docket No. 74-1233 at 1027 (2d Cir. Dec. 20, 1974).

Just as importantly, however, is that it is nearly impossible to administer federal antitrust and tender offer policy equitably and effectively without preserving to the federal courts power over the consequences of the regulation. In *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969), this Court emphasized the special early-cure role of injunction in tender offer litigation, calling it an opportunity for "doing equity," and an "instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims" 405 F.2d at 947, quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944). Recently in *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247 (2d Cir. 1973), Judge Mansfield stressed the special role of early injunctive action in tender offers, citing this Court's order in *G&W* v. *A&P* as an example.

Inherent in the grant of an injunction is a balancing of the "equities" and "hardships" involved in curtailment of an offer. One overwhelming factor would be the prospect that the offeror would have to compensate those who wished to tender because of compliance with the very bar of an injunction granted to do "equity." In fact, federal policy proceeds on the opposite premise that the interest of those who want to sell in the offer for the "premium" price is a highly "limited" one which creates no such liability in the

* S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967).

face of an injunctive bar. *See United States* v. *Chrysler Corp.*, 232 F. Supp. 651 (D.N.J. 1964).* Thus, in another case where antitrust and securities act problems were also intermingled, the court put appellants' claim in proper perspective:

> "[A] preliminary injunction barring consummation of the tender offer will deprive these stockholders of their premium. If Microdot's acquisition is in violation of the Clayton Act, this is a premium to which they cannot justly lay claim. If Microdot is vindicated and conditions permit the resuscitation of the offer, the loss will be a temporary one. If conditions do not permit renewal of the offer at the termination of this litigation, the tendering stockholders may indeed suffer some *irremedial loss.* On this record, however, I conclude that this *limited interest* of Elco's tendering stockholders must yield." *Elco Corp.* v. *Microdot Inc.*, 360 F.Supp. 741, 755 (D. Del. 1973) (emphasis added).

Of course, these same assumptions prevailed in the tender offer litigation here. This Court had before it not only the parties, but also representatives of A&P shareholders participating *amicus curiae,* including Lowenschuss. At that time he told this Court directly that the injunction would prevent him from realizing the anticipated benefits of the offer, that the tenderors' rights were "directly affected by the injunction" (45a) and argued vigorously for a reappraisal of the balances involved so as to let G&W take and pay for the A&P shares under a "sterilization" plan. He said:

> *"All that needs to be determined by this Court is: 'Should Gulf and Western be permitted to pay for the shares tendered to them?'* It is submitted that Gulf

* "The public interest in preventing a violation of Sec. 7 outweighs considerations of losses to speculating or investing stockholders resulting from the prevention of possible enhancement in stock value which might result from the acquisition." 232 F. Supp. at 657.

> and Western and A&P have adequate remedies inter se which do not affect the tendering shareholders. . . . In the meantime, the Court may avail itself of the remedy of sterilization . . . or other directives . . . pertaining to divesture of Bohack and/or whatever remedies the Court may fashion" (46a) (emphasis added).

He conceded that resolution of the issues underlying the injunction necessitated "protracted further litigation" and argued that the "interest of the tendering shareholders" was one which "must be protected immediately" (49a).*

In holding, despite these arguments, that a full bar to the offer should be continued, this Court expressly undertook a detailed balancing of all the interests raised. 476 F.2d at 698-99. At no point did it suggest that one of the hardships to be borne by G&W was the enormous cost of paying frustrated selling stockholders "damages" if the offer were enjoined or, on the other hand, that the selling shareholders would suffer little hardship because they could recover handsomely from G&W. To the contrary, this Court viewed the would-be sellers' rights, as have other courts, as limited and conditional, referring to their "tender" itself as potentially unlawful in view of the antitrust involvement:

> "A&P shareholders . . . have no inherent right to proceed with an unlawful tender; a requirement of lawfulness is included by implication in every tender offer." 476 F.2d at 698.

Lowenschuss strains to avoid the equitable impact of the Court's opinion by suggesting that this was an offhand

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* Two other A&P shareholders participating as *amici curiae*, the Josephine H. McIntosh Foundation Inc., which tendered 200,000 shares, and Neuberger & Berman, which had tendered 38,000 shares, argued vigorously that the Court should let the offer go forward. The latter urged an injunction tailored to dispel the alleged antitrust violations, in lieu of an injunction forbidding consummation of the offer, recognizing that "the granting of a preliminary injunction in a tender offer case gives . . . full relief . . . upon the merits." *Brief for Amicus Curiae Neuberger & Berman*, at 7.

remark relating to specific performance but not to the possibility of a monumental claim for "damages" if G&W complied with the injunction (L. Br. 104). This is simply untenable and ignores the fact that the Court's view was part of a comprehensive evaluation of all the conflicting interests, which gave "careful attention" to the possible frustration of those A&P shareholders who wanted to sell at premium prices. 476 F.2d at 698.

The contrary idea that the Court's order meant to place G&W in a position where it was required either (a) to accept and pay for the tendered shares in the teeth of this Court's directive to the contrary, or (b) to maintain the offer perpetually until some indefinite date when a final disposition on the merits might be obtained (including possible appeals and retrials), or (c) to stand liable to would-be sellers if it did not do either, is unthinkable. Indeed, in reviewing the argument that a preliminary injunction would deprive tendering A&P shareholders of an advantageous business opportunity, this Court said,

> "[I]f after trial on the merits G&W is vindicated, it will not be *foreclosed* from *renewing* its tender offer." 476 F.2d at 698 (emphasis added).

Obviously this view did not envision that the offer remained a viable "contract", if ever it was. Otherwise the Court would not have spoken of the necessity of "renewal" following plenary litigation or used the tentative language preceding it. Rather, faced with the reality that the injunction would remain a continuing and permanent bar to the offer unless judicially repudiated, the Court clearly understood that the effect was to frustrate the offer and discharge obligations under it. The same view was expressed by the court in the *Microdot* litigation when it spoke only of the possibility of "resuscitation" of the offer "*if* Microdot is vindicated *and* conditions permit." *Elco Corp.* v. *Microdot Inc., supra,* 360 F.Supp. at 755 (emphasis added).

These views are the federal expression of the doctrine of "impossibility", a body of law which holds that supervening administrative or judicial prohibition will ordinarily excuse performance and discharge alleged contractual liabilities of the parties. *The Texas Co.* v. *Hogarth Shipping Co.*, 256 U.S. 619 (1921); *Paramount Famous Lasky Corp.* v. *National Theatre Corp.*, 49 F.2d 64 (4th Cir. 1931); *Kansas Union Life Ins. Co.* v. *Burman*, 141 F. 835 (8th Cir. 1905); *see Matter of Kramer & Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493 (1942); *People v. Globe Mut. Life Ins. Corp.*, 91 N.Y. 174 (1883). This doctrine has particular application in the context of economic regulation. In *Pepsico, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973), faced with the claim that an antitrust injunction against performance of certain distributors' contracts would expose the defendants to contractual damage suits, this Court answered in part as follows:

> "The proposition that a court would hold one person *liable* to another for doing something within the United States which a federal administrative agency, acting within its jurisdiction, has found to be necessary for the enforcement of a federal regulatory statute arouses some *astonishment*." 472 F.2d at 187-88 (emphasis added).

Appellants implicitly concede that the doctrine of impossibility would bar their claims, but argue that it should not be applied. They have sought to meet this issue mainly by confusing it with a related but different problem, the so-called defense of "illegality," thus attacking a straw argument. First, as the court below fully recognized, we would hardly contend and clearly do not, that G&W's tender offer was "illegal"; nor has it ever been determined to be such:

> "As was made explicitly clear in my opinion prohibiting the consummation of the tender offer and in the affirmance of that opinion by the Court of Appeals, the merits of the alleged violations of the

Securities and Antitrust Laws have not been determined" (94a).

Rather, it is enough under the doctrine of impossibility, which is governed by pragmatic considerations, that substantial public regulatory concerns have required that the offer be barred pending a full antitrust trial, and that such a bar operate during the only period when the offer had commercial reality.

Second, it is the court's injunction, not one party's desire to void a contract by initiating a claim of "illegality," which bars performance of the tender offer. This is precisely what distinguishes the principal cases upon which appellants rely, cited in the margin.* In those cases performance had not been enjoined. Rather, one party to a contract claimed the right not to perform on grounds that the contract was, in some respect, "illegal". In certain cases reliance was placed directly upon Section 29(b) of the 1934 Act, 15 U.S.C. §78cc(b) (1971), which gives federal courts power to void entirely contracts which violate any provision of the Act. The answer in each case was that performance of the contract may or may not be allowed, depending on a weighing of various interests, particularly whether performance might cause an "injurious effect" on the public interest or whether voiding the contract would create unjust enrichment.

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* *See, e.g., Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941); *Bankers Life & Cas. Co.* v. *Bellanca Corp.*, 288 F.2d 784 (7th Cir.), *cert. denied*, 368 U.S. 827 (1961); *Wood* v. *Reznik*, 248 F.2d 549 (7th Cir. 1957); *Fuller* v. *Dilbert*, 244 F. Supp. 196 (S.D.N.Y. 1965), *aff'd per curiam*, 358 F.2d 305 (2d Cir. 1966)—cited at L.Br. 72-73. *See Kelly* v. *Kosuga*, 358 U.S. 516 (1959) (L.Br. 74); *Irwin* v. *Curie*, 171 N.Y. 409 (1902) (C.Br. 16). *See also Harwell* v. *Growth Programs, Inc.*, 451 F.2d 240 (5th Cir. 1971), *modified*, and *petitions for rehearing denied*, 459 F.2d 461 (5th Cir.), *cert. denied, sub nom. NASD* v. *Harwell*, 409 U.S. 876 (1972) (performance not even claimed to violate law) (C. Br. 21-22); *Judson* v. *Buckley*, 130 F.2d 174 (2d Cir. 1942) (C. Br. 15-16); *Furlong* v. *Johnston*, 209 App. Div. 198 (4th Dep't), *aff'd* 239 N.Y. 141 (1924) (C.Br. 15).

Here, in contrast, the very weighing of private and public interests called for by these cases to determine whether the "contract" should be performed despite claims of illegality is precisely what was done in the tender offer litigation and resolved *against* appellants by this Court. The crux of the *amicus* position was to argue for performance under some formula for "sterilization" or divestiture despite the alleged defects, and it was rejected. The injunction *against* performance embodies that result. And since it forbade performance without alternative, there can hardly be damages for compliance with it.*

All these cases, not involving injunctions, have been put to one side as the "class of cases" where performance is stopped "before any intervention of law." *Kansas Union Life Ins. Co.* v. *Burman, supra,* 141 F. at 848.

Appellants' reliance on *Mills* v. *Electric Auto-Lite Co., supra,* shows the mistaken perspective which underlies this position. In that case, plaintiff showed that a merger had been fraudulently procured and asked that it be set aside because it was thus "void" under Section 29(b) of the Act. The Court held that it was merely "voidable" and that whether it should be set aside depended upon a weighing

* The error in appellant Lowenschuss' position here, as described in text, is very similar to that which inheres in appellant Carpenter's claim that somehow the "savings clause" of the 1934 Act, 15 U.S.C. § 78bb(a) (1971), (which merely states that the "rights and remedies" of the Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity"), preserves a contract which has been enjoined or voided. (C.Br. 9). The savings clause merely means that the existence of a federal remedy does not displace a concurrent common law remedy. That is not at all what is involved here. The savings clause cannot preserve a transaction which has been barred to satisfy the policies of the very statute in which it appears. *See Cloverleaf Butter Co.* v. *Patterson,* 315 U.S. 148 (1942); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426 (1907). Moreover, the Clayton Act, which was the *effective* bar to consummation of the transaction, has *no* such savings clause. It thus cannot even provide a basis for the misconception which appellant Carpenter sponsors here in the case of the savings clause of the 1934 Act.

of all the "equities". 396 U.S. at 388. This was exactly what was done here when this Court balanced the equities, including appellants' claim under the supposed "unilateral" contract, and held that the contract should not be performed.

In fact, contrasting the other cases relied upon by appellants, cited here in the margin, demonstrates the correctness of the decision below. This Court's restraining order did not provide for a "license" or an "exemption" by which performance might nevertheless be rendered.* To the contrary, this is precisely what the *amicus* position on appeal argued for and lost. Nor was this simply a case of performance being made more costly;** rather, performance here was barred. Nor obviously was there any unjust enrichment—a factor which underlies so many cases where a supposed "illegality" was held not to bar performance.***

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* Compare: *Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.*, 158 F.2d 490 (9th Cir. 1946); *Dezsofi* v. *Jacoby*, 178 Misc. 851, 36 N.Y.S.2d 672 (Sup. Ct. 1942); *Brown* v. *J. P. Morgan & Co.*, 177 Misc. 626, 31 N.Y.S.2d 323 (Sup. Ct. 1941), *rev'd on other grounds*, 265 App. Div. 631, 40 N.Y.S.2d 229 (1st Dep't 1943) *aff'd per curiam*, 295 N.Y. 867 (1946) relied upon at L.Br. 71, 78, 80, 82-83, in which a party simply failed to apply for an exemption available under the restraining order involved.

** Compare: *Foster* v. *Atlantic Refining Co.*, 329 F.2d 485 (5th Cir. 1964); *Glidden Co.* v. *Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960); *Savage* v. *Peter Kiewit Sons' Co.*, 249 Ore. 147, 432 P.2d 519 (1967), *modified on other grounds*, 437 P.2d 487 (1968); *Bayview Gen'l Hosp.* v. *Associated Hosp. Serv.*, 45 Misc.2d. 218 (Sup. Ct. 1964); *American Store Equip & Constr. Corp.* v. *Buffalo Municipal Housing Authority*, 202 Misc. 222, 111 N.Y.S.2d 688 (Sup. Ct. 1952), *aff'd*, 282 App. Div. 824, 122 N.Y.S.2d 533 (4th Dep't, *aff'd*, 306 N.Y. 773, 118 N.E.2d 478 (1953); *Wheeler* v. *Connecticut Mut. Life Ins. Co.*, 82 N.Y. 343 (1880) all relied upon by appellants where there was *no impossibility at all.*

*** The basic policy, as stated in *Kelly* v. *Kosuga*, 358 U.S. 516, 520-21 (1959), is that a party should not be permitted to obtain property for nothing when he purports to be buying it. Thus in *Bankers Life & Cas. Co.* v. *Bellanca Corp.*, 288 F.2d 784 (7th Cir.), *cert. denied*, 368 U.S. 827 (1961), relied upon by appellant, a perfect example, the bank wanted to keep shares but pay nothing for them, claiming that the sale had violated the securities acts. The

Two other cases relied upon in the Lowenschuss brief were reversed on appeal, although the brief makes no note of it.*

The injunction barring the offer was clearly not G&W's "fault" as claimed by appellants. G&W did not procure the injunction, but rather fought continuously against it and "vigorously sought to defend" (94a) as the court below well knew. G&W attempted to overturn the injunction in the accelerated appeal taken to this Court. "It cannot be suggested that defendants have sought to extract themselves from this contract by their own purposeful acts" (94a). The injunction, as issued and affirmed, did not provide for any exception (permitting completion of the transaction) which G&W ignored. Moreover, the injunction's unconditional bar to consummation was based upon Section 7 of the Clayton Act, in which blameworthy conduct hardly plays a critical role. It is, as the Court below noted, "a juxtaposition of facts," trading patterns, market shares and economic assumptions which are determinative (93a).

The only "fault" lay in G&W's making the very offer which appellants seek to embrace. But the cases relied upon by appellants require far different conduct. They treat the idea of "fault" in a realistic way, as where the actor "secured or consented to" the injunction by failing to pay a mortgage which it had the capacity to do, *see Peckham* v. *Industrial Securities Co.*, 31 Del. 200, 113 A.

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rule has particular application in the case of service contracts where substantial performance has already been rendered. *See, e.g., Wood* v. *Reznik*, 248 F.2d 549 (7th Cir. 1957); *Fuller* v. *Dilbert*, 244 F. Supp. 196 (S.D.N.Y. 1965), *aff'd per curiam*, 358 F.2d 305 (2d Cir. 1966); *407 East 61st Garage, Inc.* v. *Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275 (1968).

* *Berger-Tilles Leasing Corp.* v. *York Associates*, 53 Misc. 2d 490, 279 N.Y.S.2d 62 (Sup. Ct.), *rev'd*, 28 App. Div. 2d 1132, 284 N.Y.S.2d 486 (2d Dep't 1967), *aff'd*, 22 N.Y.2d 837, 293 N.Y.S.2d 102 (1968) (L.Br. 71); *Brown* v. *J. P. Morgan & Co.*, 177 Misc. 626, 31 N.Y.S.2d 323 (Sup. Ct. 1941), *rev'd on other grounds*, 265 App. Div. 631, 40 N.Y.S.2d 229 (1st Dep't 1943) *aff'd per curiam*, 295 N.Y. 867 (1946) (L.Br. 71, 78, 80, 82-83)

799 (1921), or accepted a consent decree without any prior adjudication by a court, *General Aniline & Film Corp.* v. *Bayer Co.*, 281 App. Div. 668, 117 N.Y.S. 2d 497 (1st Dep't 1952), *aff'd*, 305 N.Y. 479, 113 N.E.2d 844 (1953), or took no steps to avail himself of an exemption available under a restraining order, *see e.g., Brown* v. *J. P. Morgan & Co., supra.* When "fault" is taken to refer to underlying conduct, the context is clearly not merely a blameworthy one, but one which would also make suspension of the alleged contract inequitable in all the circumstances. *See especially Seedman* v. *Friedman*, 132 F.2d 290, 296 (2d Cir. 1942) cited at L. Br. 70.*

Moreover, appellants concede that even in a case of culpable conduct, their own knowledge of facts which would frustrate the undertaking prior to their performance would defeat their claim. *Restatement of Contracts* § 599 (1932) (L. Br. 69-70). Appellants here had much more practical knowledge than merely an array of economic facts which might later be crafted into an anti-trust theory. They had actual knowledge that A&P intended to and then actually did launch an anti-trust action to bar the offer on the advice of counsel (22a; 116a; C. Br. 3). The message was not lost on appellant Lowenschuss (who is also a member of the class in *Lowenschuss II* "who purchased" to speculate). Upon the mere announcement of A&P's proposed opposition, according to appellant Lowenschuss:

> *"I IMMEDIATELY INSTRUCTED MY BROKER TO CANCEL MY ORDER FOR 2,000 SHARES*

* *Seedman* is an excellent example of close judicial attention to practical implications in context. The case actually turned on the fact that the injunction against performance of the contract was merely a bankruptcy injunction, the function of which was to preserve the contractual damage claim and remit it for whatever priority it might have as against other creditors in the bankrupt estate. 132 F.2d at 293. In that case, the contracting party qualified for second rank priority treatment under then existing § 64(b) of the Bankruptcy Act (Act of July 1, 1898, ch. 541, § 64, 30 Stat. 563).

> *AND WITHDRAW SAME. . . .*" (115a; capitalization in original).

Appellant Carpenter also concedes such public knowledge but makes the argument that no notice should be taken of it, claming that it would not serve the legislative purpose to hold shareholders to knowledge of management's response to the tender offer (C. Br. 17-18). This is precisely contrary to law and to Congressional expectations and assumptions underlying the mandatory pro rata and waiting periods of the Williams Act. Carpenter's argument arbitrarily ignores A&P's filings under the statute (356 F.Supp. at 1070) and the public dissemination of its response by newspaper and letters to shareholders (22a), while giving emphasis to G&W's, merely to serve her own end.

The suggestion (L. Br. 81, 12-13) that G&W was required to carry on the tender offer litigation to the bitter end raises its own conflict with public policy. It would require protracted imposition on the courts, A&P and the shareholders of both corporations, merely to allow G&W to assert the doctrine of impossibility. This is not the law. Questions relating to the practical frustration of a contract "must be answered by some test which can be applied at the time when a decision must be made." *Borup* v. *Western Operating Corp.*, 130 F.2d 381, 386 (2d Cir.), *cert. denied*, 317 U.S. 672 (1942). The district judge who oversaw the preliminary hearings and was charged with this case was in a unique position to evaluate that decision.

Although appellants would have the Court believe otherwise (L. Br. 78-80; C. Br. 12), impossibility

> "means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." *Restatement of Contracts* § 454 (1932).

It is based upon practical realities and must be given pragmatic application. This Court recently acknowledged that

a temporary injunction on antitrust grounds is tantamount to a permanent bar, because it

> "will continue in force until the trial and decision of a complicated antitrust case before a busy District Judge, with [the other party] having the strongest motivation for foot-dragging."

The Court said,

> "Experience seems to demonstrate that just as the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger, the grant of a temporary injunction on antitrust grounds at the behest of a target company spells the almost certain doom of a tender offer." *Missouri Portland Cement Co.* v. *Cargill, Inc., supra,* 498 F.2d at 870.

It is, at the least, an event of sufficient terminal weight to qualify for the impracticability test controlling under the law.

In securities transactions, time is of the essence, *Restatement of Contracts,* § 276 (1932), and tender offers are no exception. *Elco Corp.* v. *Microdot Inc., supra,* 360 F.Supp. at 755. Professor Corbin's statement of the rule relating to government restraints is particularly instructive. He states that a contract,

> "certainly is discharged if [the restraint] lasts during the whole period allowed by the contract for performance. It has also been held to be discharged just as soon as it reasonably appears to the contractor that it will be in effect throughout the entire period, or for such a large part thereof as to frustrate substantially the contractor's contemplated purpose or to make his performance substantially more difficult or expensive. 6 A. Corbin, *Contracts* § 1348 at 441 (1962).

Obviously, the Court in *G&W* v. *A&P* contemplated that its injunction had terminated the current offer, and thus spoke of "renewing" it if G&W were successful after a

trial on the merits. It hardly adopted the view that it would require a trial of A&P's claims on the merits to determine whether or not the injunction had frustrated the tender offer back in February 1973. Indeed, this Court's expression of a hope for the "earliest possible date for a trial consistent with the rights of the *parties*," 476 F.2d at 699 (emphasis added), was clear recognition of the inherent perishability of the offer.

In the same vein, appellant Carpenter's suggestion—that G&W could readily have removed the "basis" for the injunction by merely disassociating from Bohack, coupled with a publication of an intention to "control" A&P (C. Br. 12)—is entirely contrary to this Court's opinion. This Court's affirmance of the injunction hinged entirely on potential reciprocal and buyer-seller relationships *regardless* of any disposition of Bohack shares. 476 F.2d at 693-94. Carpenter's belated suggestion here was directly put to this Court in the original appeal (46a) and rejected. Under the antitrust view adopted by this Court, Carpenter's position raises the incredible spectacle of G&W's dismembering itself in order to eliminate every basis for potential anti-competitive effect within the conceit of A&P's lawyers, before the specific claims had been ruled upon by a court of law, and in the process of which A&P's lawyers would doubtless have raised additional objections. Such a position bears no relationship to the law and deserves no consideration.

Finally, Lowenschuss claims—wholly as an afterthought to the decision below—that liability should be based on the assumption that the A&P shareholders could not have withdrawn their shares between the time the district court first enjoined the tender offer and the affirmance by this Court following the accelerated appeal (February 9, 1973 to March 12, 1973) (L. Br. 93). This assertion is based on the original terms of the offer which stated that tenders were "irrevocable," but, of course, at the time in question, the offer had already been frustrated and enjoined.

The answer is that any assumption either way is both entirely uncertain and immaterial. It is nowhere suggested (much less alleged) that appellant Lowenschuss (or any member of his class) ever sought the return of his shares but was refused. To the contrary, in the period involved, G&W was aggressively pursuing an expedited appeal to this Court, and Lowenschuss was firmly allied with G&W's position, pressing the idea that G&W should be allowed to accept and purchase the shares (62a-63a). The claim raised here is wholly a false one because what the appellants clearly wanted was to tender their shares and had no intention of selling them. *See Levine* v. *Seilon, Inc., supra.* Carpenter concedes that the issue is immaterial, acknowledging that because the proposed offering price was always above the market price "it was hardly to be expected that the A&P shareholders would take advantage of their 'right' to withdraw their shares" (C. Br. 18-19).*

What would have happened if these or any other class members had requested an interim return of shares—which were in custody of the depository but unaccepted by G&W—is wholly speculative. No request was made, and the issue was never crystallized for action. In the absence of such a request this claim of "damages" is speculative, and thus in the purest sense, not legally cognizable (L. Br. 55).

Finally, examination of appellants' claim that the absence here of a "litigation-out" clause in the tender offer should change the result yields precisely the opposite conclusion. As appellants themselves point out, such clauses permit an offeror to withdraw a tender offer merely upon (a) the "threat" or (b) the "institution" of litigation (L. Br. 98-99; C. Br. 12; 226a). Its function is thus to permit a *contractual termination* of an offer at a stage short of any *legal*

* Indeed, for Mrs. Carpenter, who tendered 1,957,012 shares of the common stock of A&P (C. Br. 3), a market sale was in any event a practical impossibility. And for Lowenschuss, the claim is unreal, for he speaks of the shareholders being unable to sell their shares "even if they had wanted to" (L. Br. 94).

termination of an offer which may be created by judicial decree. Such a clause would have been relevant if G&W had sought to withdraw the offer when A&P's management threatened suit on February 2, 1973 or actually filed it on February 5, 1973. G&W did not do so. Rather, it fought the litigation, adhering to the offer, but was enjoined. And it is the judicial decree which makes performance "impossible" under the law.

It is wholly unnecessary to provide that the offeror would not consummate the offer if enjoined from doing so, not merely because no one would suppose otherwise, but because it is implied by law as Judge Timbers indicated. 476 F.2d at 698. It is, in the words of Justice Holmes, among the class of conditions which "it would be extravagant to say were excluded because they were not written in." *The Kronprinzessin Cecile,* 244 U.S. 12, 24 (1917), cited in *L.N. Jackson & Co.* v. *Royal Norwegian Government,* 177 F.2d 694, 700-01 (2d Cir. 1949), *cert. denied,* 339 U.S. 914 (1950). There is no difference in effect between those conditions which the law implies and those which are made express. *Kansas Union Life Insurance Co.* v. *Burman, supra,* 141 F. at 846.

* * * *

In the preceding discussion, we have assumed *arguendo* that appellants' tender pursuant to G&W's offer would constitute a "contract" under state law.

In fact, however, we have been unable to find any New York case which suggests that a person tendering pursuant to a so-called "offer of unilateral contract", at a time when he knows the existence of that "offer" is being challenged in a court of competent jurisdiction, can create a "contract" which is binding in the event that such court preempts and forbids the offer. Certainly, no case relied upon by either appellant here suggests remotely that this would be so.*

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* Appellant relies on cases of the following genre: *Grossman* v. *Schenker,* 206 N.Y. 466, 100 N.E. 39 (1912) (bilateral employment contract); *Scott* v. *Motor Lodge Properties, Inc.,* 35 Misc.2d 869,

Particularly, appellant Lowenschuss' extensive reliance on *Bache & Co.* v. *International Controls Corp.*, 324 F.Supp. 998 (S.D.N.Y. 1971), *aff'd per curiam*, 469 F.2d 696 (2d Cir. 1972), a diversity case, is entirely misplaced. *Bache* involved a *consummated* tender offer, not an unconsummated one as here. There was no injunction and no other hindrance to the offer, and the case simply bears no resemblance to the problem at bar.

III

G&W's Retirement From The Tender Offer Did Not Create A Cause Of Action.

There remains for consideration appellant Lowenschuss' plainly frivolous claim that G&W should be liable because it somehow retired improperly from its tender offer *after* the offer had been frustrated and barred by the injunction affirmed by this Court.

It will be recalled that the offer here was enjoined by the District Court on February 13, 1973. Two days later, Lowenschuss filed the instant action claiming that G&W was required to consummate the offer and that it owed him $20 per share in any event. The offer was "extended" twice pending appeal, but no additional tenders were permitted.

On March 13, this Court affirmed the injunction. G&W immediately announced general procedures for the withdrawal of shares. On March 16, 1973, the adjourned expira-

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231 N.Y.S.2d 780 (Monroe County Ct. 1962) (motel liable for refusal to place personalized telephone-book covers in rooms after agreeing to do so if publisher of advertising medium would supply them free); *The Eraser Co.* v. *Kaufman*, 138 N.Y.S.2d 743 (Sup. Ct., Onandaga County, 1955) (covenant not to compete binding when defendant performed under an unsigned employment contract); *In re Lord*, 175 Misc. 921, 25 N.Y.S.2d 747 (Surr. Ct. 1941) (college began construction of a library in reliance on donor's promise); *City Stores Co.* v. *Ammerman*, 266 F.Supp. 766 (D.D.C. 1967), *aff'd*, 394 F.2d 950 (D.C. Cir. 1968) (offer by shopping center to give a rental option to a department store if store supported their bid for rezoning was deemed accepted by the store's letter to rezoning board).

tion date, G&W was required to take some action with respect to the formal status of the offer. Accordingly, G&W issued a press release on March 16, restating the fact that the injunction of the offer had been affirmed; that the offer be "extended" until June 15th subject to termination on three days' notice; that time was needed to consider the problems in litigation; that while a further extension might be considered, no new shares could be accepted, while all tendered shares could be withdrawn. G&W initiated a one-sided technical freeze and announced a policy of maintaining the status quo, while allowing all shareholders freedom of action. This was perfectly reasonable.

Yet it is this action which apparently is to be the basis for some other kind of recovery (L. Br. 54-60).*

G&W was faced with one action resisting the tender offer *(G&W v. A&P)* and by another demanding its consummation in any event (the instant litigation), as well as by an opinion of this Court which stated broadly that market factors alone—regardless of whether G&W exercised control over A&P or engaged in any wrongful act—might result in vertical and horizontal effects harmful to competition. G&W did no wrong when it too sought to maintain the status quo (apart from any election by shareholders to withdraw), so that at least some of the legal questions could be analyzed and the complex situation resolved.

Then, although this Court's opinion had implicitly recognized the perishability of tender offers and urged an expe-

* Lowenschuss' entire claim here is that the March 16, 1974 press release constituted a "representation" by G&W that it intended "either to cure the difficulties" in the enjoined offer (which were incurable) or to protract the litigation to establish its "legality" (difficult, to say the least, and remote at best) (L. Br. 55). In fact, the whole claim here is merely a self-serving recharacterization of the release into something it obviously did not say and which no additional evidence could make it say. This situation, involving an enjoined and defunct tender offer, obviously has no relation whatever to *Walling* v. *Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973), which involved the subsequent manipulation of price-determining conditions in an actually consummated transaction, upon which Lowenschuss wholly relies, extracting language out of context.

ditious trial, 476 F.2d at 899, it quickly was made clear after the first volley of pretrial discovery that no such trial was even remotely forthcoming.

On June 15, 1973, G&W issued another press release stating that it was necessary to preserve the status quo of its offer pending certain court decisions, referring expressly to the motion in this case by which it sought to determine "the present legal status of the tender offer", and advised A&P shareholders to consult their own counsel as to questions they might have relating to the withdrawal of shares or permitting the shares to remain on deposit.

Following the decision below, the offer was formally withdrawn.

The Court below to whom all these cases had been assigned, monitored these events as they happened; and was wholly satisfied as to the absence of any

> "evidence that the defendants have done anything other than deal fairly with plaintiff and the class he represents" (97a).

There are simply no grounds for suggesting otherwise.

IV

Lowenschuss' Attempt To Divert Attention From The Legal Issues To The Non-Existent Misconduct Of The Trial Judge Must Be Rejected.

We find it necessary to address an issue as to which we would ordinarily take no position, because appellant Lowenschuss has interwoven it throughout his papers on appeal.

While admitting that there is no explicable basis for it (L. Br. 113), Lowenschuss contends that the Court below "acted with manifest bias toward Mr. Lowenschuss individually" (L. Br. 107), pointing to footnote 1 of the decision appealed from.

There, Judge Duffy—at a time when criticism of the legal profession's insensitivity to ethical problems was mounting—expressed understandable disturbance at the prospect of

a single law office organized to provide on an "in-house" basis a whole cast of characters, investor, plaintiff and attorney, whose role depended upon the turn of events in a tender offer. Here, Lowenschuss and his in-house "pension fund" could buy shares on announcement of the offer and profit on the speculation *if* the tender offer was successful (7% in 15 days), *or* bank the law suit *if* it were not—litigating for damages and attorneys fees—all without ever the need of a genuine client.

For disciplinary purposes, Lowenschuss appears to indicate that each case turns on the so-called "intent" of the attorney at the time of purchase (100a-101a), which presents a rather serious evidential problem. We have no position on nor concern with the particular facts here. Whatever the facts in this instance, the concerns expressed by Judge Duffy are hardly dissolved.

However, during all of the proceedings below, we were totally unable to detect any bias by Judge Duffy against this litigant. The charges directly and implicitly leveled against the district court by Lowenschuss here are simply unfounded.

Judge Duffy referred to Lowenschuss' switching contract and securities claims "without compunction" (89a) because that characterization was accurate.

The claim that Judge Duffy's statement that no class member had "attempted to intervene in" the *G&W* v. *A&P* action (87a) indicates the court's neglect or bias (L. Br. 18) is a total misrepresentation. The context shows that Judge Duffy was referring to that period prior to the time the injunction at issue was granted, and that he was entirely correct (87a).

Judge Duffy's reference to the position espoused by Lowenschuss, one of demanding the tender offer and yet calling it illegal as an "unsettling irony" (96a), is hardly an inappropriate characterization—particularly when, as the record shows, all the alleged deficiencies Lowenschuss

now asserts in the offer were flaws he previously deemed inconsequential and otherwise characterized as "vague and spurious" (48a).

It is also totally true that in making his own motion for summary judgment, Lowenschuss *never* suggested that consideration of the merits was inappropriate in view of his pending motion for class determination. The Court below was entirely correct in noting that the objection was first heard from him when the Court decided against him on the substantive motion for judgment (133a).

Judge Duffy's procedure here was perfectly proper. It would hardly have been correct for the district judge, believing that the action should be dismissed on its merits, to *first* go through the procedure of giving the alleged class a "notice" (omitting mention of his belief) which could draw them into the litigation, and then decide the motion against them once they were drawn in. Here, in indicating his disposition to dismiss the suit, Judge Duffy gave class members the opportunity to "opt out" under Rule 23 F.R.C.P. and thereby avoid strict *res judicata* effect of the proposed decision, as well as to reargue. The only persons who could imaginably have been hurt by this were G&W and the other defendants, since the full effect of the decision would likely have been reduced by the number who opted out. No decision to grant substantive relief prior to giving notice to the members of the class could create a "denial of due process" (L. Br. 114), because Rule 23 requires voluntary adherence before there is any binding effect at all. Lowenschuss simply misconceives the procedure.

In all this, Lowenschuss fails to recall his attempt to divest the Court below of jurisdiction through a spurious appeal from an outdated order (167a-171a); his attempt to have the cases retransferred to the Eastern District of Pennsylvania after substantive issues had been determined against him (194a-205a; 207a-208a); his attempt to intervene in the *G&W* v. *A&P* litigation, *following* the decision

by this Court, specifically to seek the same modification of the injunction which had been denied by this Court; and his various appeals which have been summarily dismissed or remanded by this Court.

Far from displaying bias, Judge Duffy treated appellant with consideration and respect throughout the entire course of the proceedings. The idea that Judge Duffy should be removed from a role in these cases merely ranks with the other overreaching theories sponsored herein by appellant Lowenchuss.

CONCLUSION

The judgment of the court below was entirely correct and should be affirmed.

Respectfully submitted,

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Statutory Supplement

Certain Additional Sections of the "Williams Act" Amendments to the Securities Exchange Act of 1934 [§§ 13(d)-(e), 14(d)-(f); 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f)]

Section 14(d)(5), 15 U.S.C. § 78n(d)(5):

"Securities deposited pursuant to a tender offer or request or invitation for tenders may be withdrawn by or on behalf of the depositor at any time until the expiration of seven days after the time definitive copies of the offer or request or invitation are first published or sent or given to security holders, and at any time after sixty days from the date of the original tender offer or request or invitation, except as the Commission may otherwise prescribe by rules, regulations, or order as necessary or appropriate in the public interest or for the protection of investors."

Section 14(d)(6), 15 U.S.C. § 78n(d)(6):

"Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders, as described in paragraph (7), is first published or sent or given to security holders."

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 10th day of January , 1975, I served a copy of the annexed paper upon Fred Lowenschuss Associates and Abraham E. Freedman, Esq., 346 West 17th Street, New York, New York 10011; Milton Paulson, Esq., 122 East 42nd Street, New York, New York 10017; Mark Fishman, Esq., Sullivan & Cromwell, 48 Wall Street, New York, New York 10005

by depositing a true copy of the same in a properly addressed postpaid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Post Office Department located in the City, County and State of New York.

Marie Mulhall

Sworn to before me this
10th day of January , 1975.

Dard Kiewra

DARD KIEWRA
Notary Public, State of New York
No. 41-4508134
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1975